No. 80-835

In the Supreme Court of the United States

OCTOBER TERM, 1980

DASCO, INC., ET AL., PETITIONERS

v.

AMERICAN CITY BANK AND TRUST COMPANY, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, under Nevada law, the district court erred in excluding evidence of the probability of a change in the zoning laws from its determination of the fair market value of real property for the purposes of Nevada deficiency judgment proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-11a) is not reported. The opinion of the district court (Pet. App. 3a-8a) also is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1980. The petition for a writ of certiorari was filed on November 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 5, 1974, respondent American City Bank and Trust Company, N.A., deeded to petitioner Dasco, Inc., a 40-acre tract of unimproved land located in Las Vegas, Nevada. In exchange for the deed, Dasco executed its promissory note for $1,450,000 secured by a deed of trust dated November 5, 1974. In addition, Dasco's president and his wife, petitioners Dudley A. Smith and Sherriel Smith, executed a personal guarantee of the note and mortgage to the extent of $100,000 (Pet. 4-5; Pet. App. 4a-5a).

Thereafter, the bank became insolvent, and on October 21, 1976, respondent Federal Deposit Insurance Corporation was appointed the receiver for the bank. On or before March 11, 1977, the promissory note became in default and the FDIC made a demand for payment upon petitioners. The FDIC then gave proper notice and scheduled the property to be sold at a public trustee's sale (Pet. 5; Pet. App. 5a).

2. Before the sale could take place, however, petitioners filed the present suit in a Nevada state court, seeking specific performance in the form of an order to compel the FDIC to accept Dasco's tender of the deed to the property in full satisfaction of its promissory note. Upon the FDIC's petition pursuant to 28 U.S.C. 1441(a) and 12 U.S.C. 1819, the action was removed to the United States District Court

for the District of Nevada. The FDIC then counterclaimed, seeking a deficiency judgment on the promissory note and the personal guarantees for the difference between the note and the fair market value of the property on the date of the trustee's sale (Pet. 5-6).

On March 9, 1977, the district court denied petitioners' motion for a preliminary injunction, which permitted the trustee's sale to be carried out. *Dasco, Inc.* v. *American City Bank and Trust Co., N.A.*, 429 F. Supp. 767 (D. Nev.). On March 11, 1977, the property was sold for $1,200,000 (Pet. App. 5a).

On March 31, 1978, the district court found that the fair market value of the property on the date of the sale was $1,375,000, and awarded the FDIC a deficiency judgment in the amount of $295,709.13 plus interest. The Smiths were held liable to the extent of their $100,000 guarantee (Pet. App. 5a-6a).[1] In determining the fair market value of the property, the district court heard several appraisals of the property offered by witnesses for both sides (Pet. App. 10a). The court, however, excluded expert testimony offered by petitioners concerning the probability that a portion (15 acres) of the 40-acre tract would be rezoned and that such rezoning would enhance the fair market value of the property (Pet. 6-7).

The court of appeals affirmed, stating (Pet. App. 10a-11a) that "[w]hile the evidence of the probability of a zoning change might have been probative and admissible, it does

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[1]The district court also found (Pet. App. 6a-7a) that no binding oral or collateral agreement had been entered into on November 5, 1974, between petitioners and the bank to the effect that, upon default, petitioners could merely deed the property back to the bank in full satisfaction of their obligations. In view of this finding, the court held (Pet. App. 7a-8a) that specific performance was not available against the FDIC as the bank's receiver. Petitioners have not challenged that part of the district court's decision before this Court.

not follow that its exclusion was reversible error. In light of the number of witnesses who testified on the subject, the judge had all the help he needed."

ARGUMENT

Petitioners contend (Pet. 7-12) that the district court erred in excluding certain evidence from its consideration of the fair market value of the subject property. The decisions of the court of appeals and the district court, however, are plainly correct and do not conflict with any decision of this Court or any court of appeals. Further review of this question of state law thus is unwarranted.

Petitioners cite no Nevada law, but, instead, rely on a variety of sources that indicate nothing more than that, in determining the fair market value of real property *for eminent domain and condemnation* purposes, evidence of the probability of a zoning change *may* be considered. Nevada law—which, of course, is controlling—distinguishes, however, between the valuation of property for condemnation purposes and the valuation of property for purposes of deficiency judgment proceedings, as here (*Tahoe Highlander* v. *Westside Federal Savings & Loan Association*, 95 Nev. 8, 11, 588 P.2d 1022, 1024 (1979)):

> Although highest and best use may be determinative of value for purposes of condemnation, see *Sorenson* v. *State ex rel. Dep't of Hwys.*, 92 Nev. 445, 552 P.2d 487 (1976), it is but one factor to be considered in ascertaining the property's fair market value for purposes of deficiency judgment proceedings. See *Union Nat. Bank of Pittsburgh* v. *Crump*, 349 Pa. 339, 37 A.2d 733 (1944). Accordingly, the district court, in exercise of its discretion, could properly consider the experts' testimony relative to highest and best use, along with the rest of the evidence in the record, in determining the fair market value of the property.

> Where, as here, that determination is supported by substantial evidence, it will not be disturbed on appeal. *[Ibid.]*; see also Briggs v. *Zamalloa*, 83 Nev. 400, 432 P.2d 672 (1967).

Thus, since the "highest and best use" of property may be determinative of its valuation for condemnation purposes, whereas it is only one factor to be considered in ascertaining the property's fair market value in deficiency judgment proceedings, it follows that the authorities relied on by petitioner involving condemnation and eminent domain proceedings are inapposite to the instant claim for a deficiency judgment.

Moreover, because the "highest and best use" of the property was only one factor to be considered, and because the district court judge "had before him several appraisals offered by witnesses for both sides" (Pet. App. 10a), his exclusion of evidence concerning a possible zoning change and consequent increase in the value of the property did not constitute reversible error. As the court of appeals recognized (*ibid.*), "[i]t was for the trial judge to determine whether the proferred evidence would have aided his determination of fair market value."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1981

DOJ-1981-01